STATE OF MICHIGAN

COURT OF APPEALS

STANLEY DEHAAN,

Plaintiff-Appellee,

v

ROBERT TSARNAS, BARBARA SIELAFF, and DIRK AILTS, d/b/a OMNI IDENTITY NORTH AMERICA (NA), LLC,

Defendants,

and

JOAN POST,

Defendant-Appellant.

UNPUBLISHED
June 15, 2010

No. 289967
Kent Circuit Court
LC No. 07-007841-CZ

Before: OWENS, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Defendant-appellant Joan Post appeals as of right from the default judgment against her, arguing that the default should be set aside because service of process was not adequate. We affirm.

In April 2005, defendant Robert Tsarnas created Omni Industry, North America, LLC ("Omni"), a limited liability company. The defendants in this cause of action, including appellant, were the sole members of Omni. In the fall of 2005, plaintiff paid Omni approximately $50,000 in exchange for a membership interest in the company. However, unbeknownst to plaintiff at the time, Omni was not an operating company. Plaintiff later requested to see Omni's financial records and to have his investment in the company returned to him, but neither request was granted. Plaintiff then filed this cause of action, claiming, among other things, that defendants had misrepresented the nature of the company to him and at least some of the defendants had converted his investment for their personal use.

Plaintiff successfully served defendants Ailts, Tsarnas, and Sielaff.[1] However, a process server visited appellant's last known home address, at 3389 Brookview Court in Hudsonville (the Brookview residence), on seven separate occasions between August 11 and October 8, 2007, but was unable to serve appellant. After visiting appellant's residence for the seventh time on October 8, the process server went to appellant's mother's house. The mother told the process server that appellant no longer lived either at the Brookview residence or with her mother, but still came to visit.

Upon discovering that appellant no longer lived at the Brookview residence, plaintiff moved for alternate service of process.[2] The trial court ordered alternate service, specifying that service of the summons and complaint could be served by "[t]acking or firmly affixing to the door at 3389 Brookview Court, Hudsonville, MI 49426," and by "[d]elivering and/or firmly affixing to the door at 4821 Summergreen Lane, Hudsonville, MI 49426. This is the address of defendant Joan Post's mother, Josephine Meeuwenberg." The process server later affirmed that on November 5, 2007, at 4:43 p.m., he served the summons and complaint, attachments, and order for alternate service to appellant by posting the documents at the Brookview residence and at appellant's mother's residence.[3]

Apparently appellant received the summons and complaint, because she obtained the services of an attorney, who in turn obtained an extension of time to file an answer. However, appellant never filed an answer within the proscribed time period, and on December 26, 2007, a default against appellant "for failure to plead or otherwise defend as provided by law" was entered.

Appellant first responded to plaintiff's complaint in an answer dated January 10, 2008, and filed on January 18, 2008. In the answer, she denied wrongdoing, claiming that she had never received funds from Omni and that Tsarnas was in control of the company's finances. On the same day, appellant moved to set aside the default against her. She maintained that because service was made upon her by "posting," the trial court should have ordered that she receive at least 28 days to file an answer pursuant to MCR 2.108(A)(3). She also claimed that her attorney, a solo practitioner, was without the services of an assistant between December 21, 2007, and January 2, 2008, and as a result did not realize that the answer had not been filed until January 3, 2008. Appellant requested that the default be set aside, claiming that other defendants were still going to trial, injustice would occur if she were defaulted, and she had a meritorious defense.

The trial court denied appellant's motion, concluding that no good cause existed to set aside the default. Specifically, the trial court determined that appellant's attorney's negligence

---

[1] An order of default was issued against Tsarnas "for failure to plead or otherwise defend as provided by law."

[2] Plaintiff was unable to determine appellant's current home address. Apparently appellant's mother had not provided the process server with this information.

[3] The process server also mailed copies of these documents to both the Brookview and Summergreen addresses.

was not excuse for failing to file an answer in a timely manner, and that the service of process was appropriate.

On December 1, 2008, after the cause of action against Sielaff and Ailts had been resolved, plaintiff moved for a judgment against all defendants, noting that a default had been entered against Tsarnas on September 13, 2007, and against appellant on December 26, 2007. Over appellant's objections, the trial court entered a default judgment in this case on January 5, 2009. The trial court ordered entry of default judgment in favor of plaintiff and against Tsarnas and appellant jointly and severally in the amount of $44,700.00, plus judgment interest of $3,015.14, costs of $291.32, and statutory attorney fees of $75.00. The trial court specified that the judgment represented plaintiff's damages less all amounts paid to date by Sielaff and Ailts.

Appellant now claims that the trial court's failure to set aside the default judgment against her constitutes an abuse of discretion, both because the service of process was not proper and, therefore, she had good cause for not filing an answer, and because she had a meritorious defense to plaintiff's claims. We disagree. Appellant has failed to establish that the trial court abused its discretion when it determined that she had no good cause for not filing an answer. Because appellant failed to establish good cause, we need not consider whether her defense was meritorious.

We review a trial court's decision on a motion to set aside a default judgment for a clear abuse of discretion. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 552; 620 NW2d 646 (2001). In *People v Babcock*, 469 Mich 247, 269; NW2d 231 (2003), our Supreme Court stated:

> At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. [Citations omitted].

Our Supreme Court adopted the *Babcock* test as the default abuse of discretion standard in *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). In *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228; 600 NW2d 638 (1999), our Supreme Court noted, "This Court historically has cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters."

"[A]lthough the law favors the determination of claims on the merits, it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Id.* at 229 (citations omitted). MCR 2.603(D)(1) states, "A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." The defendant's obligation to show good cause and to show, through submission of an affidavit of facts, that a meritorious defense exists are separate requirements. *Alken-Ziegler, Inc*, 461 Mich at 229-230. The merits of the proposed defense may not be considered when determining if good cause exists to set aside the default. *Id.*

To establish that good cause exists to set aside a default, the defendant must show either (1) "a substantial irregularity or defect in the proceeding upon which the default is based," or (2) "a reasonable excuse for failure to comply with the requirements that created the default."[4] *Id.* at 233.

Appellant claims that good cause existed to set aside the default because service of process was deficient. In particular, she claims that the service of process that she received consisted of "posting a publication" and, consequently, the trial court was required to provide a specific time of at least 28 days for her to file an answer. In making this argument, appellant appears to contend that good cause to set aside the default existed because there was "a substantial irregularity or defect in the proceeding upon which the default is based."[5] *Id.* at 233.

MCR 2.106 "governs service of process by publication or posting pursuant to an order under MCR 2.105(I)." MCR 2.106(A). If the court orders notice of the action by posting, the defendant is notified of the action by (1) "posting a copy of the order in the courthouse and 2 or more other public places as the court may direct for 3 continuous weeks or for such further time

---

[4] Although case law predating *Alken-Ziegler* indicated that establishing "manifest injustice" could constitute a third way to establish the good-cause requirement, the *Alken-Ziegler* Court indicated that this was not actually the case. The Court explained:

> [P]roperly viewed, "manifest injustice" is not a discrete occurrence such as a procedural defect or a tardy filing that can be assessed independently. Rather, manifest injustice is the result that would occur if a default were to be allowed to stand where a party has satisfied the "meritorious defense" and "good cause" requirements of the court rule. When a party puts forth a meritorious defense and then attempts to satisfy "good cause" by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the "good cause" showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of "good cause" will be required than if the defense were weaker, in order to prevent a manifest injustice. [*Alken-Ziegler, Inc*, 461 Mich at 233-234.]

[5] Admittedly, the most direct reason for why defendant's answer was not filed in a timely manner rests with her attorney; appellant's attorney requested a certain time period in which to file the answer and then, as a result of some sort of negligence within his office, failed to file the answer within that proscribed period. It is well-established that an attorney's negligence is attributable to his client and does not constitute good cause for setting aside a default. *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 331; 712 NW2d 168 (2005). Because it is undisputed that appellant actually received notice of the cause of action, that her failure to file an answer was a result of her attorney's negligence, and that the default was entered because she failed to file the answer, she has not established a "reasonable excuse for failure to comply with the requirements that created the default." *Alken-Ziegler, Inc*, 461 Mich at 233. However, appellant does not raise the existence of mismanagement within her attorney's office as "good cause" for setting aside the default.

as the court may require," and by (2) "sending a copy of the order to the defendant at his or her last known address by registered mail, return receipt requested, before the last week of posting," if the present or last known address of the defendant is known. MCR 2.106(E). When service is made pursuant to MCR 2.106, the trial court is required to "allow a reasonable time for the defendant to answer or take other action permitted by law or these rules, but may not prescribe a time less than 28 days after publication or posting is completed." MCR 2.108(A)(3).

Although appellant correctly notes that when service is made pursuant to MCR 2.106 a defendant has at least 28 days to file an answer, she was never given service by posting, i.e., the court never directed that notice of an order permitting service pursuant to MCR 2.106 be posted in a courthouse or other public place. Instead, pursuant to MCR 2.105(I), the trial court ordered service on appellant by tacking the summons and complaint to the door of her last known residence, as well as to the door of her mother's residence. MCR 2.106 was never implemented and, accordingly, the requirements set forth in MCR 2.108(A)(3) do not apply.

Instead, the trial court appropriately followed MCR 2.105 when ordering alternate service of process on appellant. MCR 2.105(A) indicates that process may be served on an individual by (1) "delivering a summons and a copy of the complaint to the defendant personally," or by (2) "sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee."[6] When a showing is made that "service of process cannot reasonably be made as provided by this rule," MCR 2.105(I) permits the trial court to order service of process to be made "in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard." Plaintiff established that he was unable to obtain service of process on appellant pursuant to MCR 2.105(A); the affidavit submitted by the process server established that he had attempted to personally serve appellant seven times at the Brookview residence without success and, after contacting appellant's mother, learned that appellant no longer lived at the Brookview residence or at her mother's residence. See MCR 2.105(I)(2). The trial court ordered that service of appellant was permitted by "tacking or firmly affixing" a copy of the summons and complaint to the door of the Brookview residence, and by "[d]elivering and/or firmly affixing" another copy of the summons and complaint to the door of appellant's mother's residence.

Appellant does not dispute that the alternate service of process permitted by the trial court was "reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard."[7] MCR 2.105(I)(1). Instead, appellant simply appears to argue that she had good cause for failing to file an answer because posting and tacking are similar and, therefore, pursuant to MCR 2.108(A)(3), the trial court should have specified that she had at least

---

[6] When the second method is employed, "[s]ervice is made when the defendant acknowledges receipt of the mail." MCR 2.105(A)(2).

[7] Indeed, considering that appellant retained an attorney and that the attorney requested an extension of time to file an answer to the complaint in late November 2007, it is clear that the alternate service of process resulted in appellant's receipt of notice of the cause of action filed against her.

28 days in which to file the answer. However, defendant fails to expand on this argument and provides no authority to establish that "posting" and "tacking" are functionally identical, or that the requirements of MCR 2.108(A)(3) should also apply to service made pursuant to MCR 2.105(I) if that service involves "tacking" the summons and complaint to a defendant's last known residence (or the residence of a family member that defendant is known to visit). Accordingly, we need not address the issue further. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Regardless, we briefly note that the service of process ordered by the court is not the functional equivalent of posting notice of the cause of action at a courthouse and other public venues. Notice by posting or publication relies, at least in part, on the probability that a defendant would actually discover the public notice by coming across it in a newspaper or on a public bulletin board. By authorizing service of process by tacking the summons and complaint to the door of appellant's last known residence and at her mother's house, the trial court targeted the "affixing" of notice to areas that appellant was known to frequent, greatly increasing the probability that she would actually discover that a cause of action had been filed against her.[8]

Accordingly, appellant has failed to establish that there existed "a substantial defect or irregularity in the proceedings upon which the default are based" and that the trial court abused its discretion when it determined that no good cause existed to set aside the default. The rest of appellant's arguments concern her assertion of a meritorious defense to plaintiff's cause of action. However, because the trial court did not abuse its discretion when it determined that no good cause existed to set aside the default, we need not determine whether appellant had established a meritorious defense.[9]

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Michael J. Talbot

---

[8] Even if appellant no longer lived at the Brookview address, as her mother claimed, by also delivering the summons and complaint to her mother's house, the mother would become aware of the cause of action and would presumably inform her daughter.

[9] In the rest of the issues raised on appeal, appellant argues that she has a meritorious defense because plaintiff failed to state any claims against her on which relief could be granted and, hence, she would be entitled to summary disposition pursuant to MCR 2.116(C)(8). She then argues why summary disposition of each of plaintiff's claims against her would be appropriate. Appellant cites *ISB Sales Co v Dave's Cakes*, 258 Mich App 520; 672 NW2d 181 (2003), and *Kornak v Auto Club Ins Ass'n*, 211 Mich App 416; 536 NW2d 553 (1995), to support her position, claiming that these cases "state that even though a default has been rendered against a Defendant, there must be an underlying complaint that would survive a motion for summary disposition based on the pleadings alone." However, neither case supports this proposition, and appellant provides no other authority supporting her position.